Filed 3/6/19 Gauna v. JPMorgan Chase Bank, N.A. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

RAINN GAUNA, Plaintiff and Appellant, v. JPMORGAN CHASE BANK, N.A., et al., Defendants and Respondents.	C078490 (Super. Ct. No. CU13-079937)

Rainn Gauna sued JPMorgan Chase Bank, National Association (JPMorgan Chase), Chase Home Finance, LLC (Chase Home Finance), California Reconveyance

Corporation (CRC) and Deutsche Bank National Trust Company as trustee of Long Beach Mortgage Loan Trust 2005-1 (Deutsche Bank) after her property was sold at a nonjudicial foreclosure sale. The trial court sustained defendants' demurrer to all causes of action in a first amended complaint without leave to amend.

Gauna now contends the trial court erred in (1) taking judicial notice of hearsay and disputed facts, (2) ruling that her fraud and deceit cause of action is time-barred, (3) concluding that the first amended complaint does not state a cause of action for breach of contract and that her breach of contract claim is time-barred, (4) ruling that she lacked standing to challenge the assignment of the deed of trust and that tender is required to state a cause of action for wrongful foreclosure, (5) sustaining the demurrer to her causes of action for cancellation of instruments, slander of title and violation of Business and Professions Code section 17200 et seq., (6) denying her leave to amend, and (7) hearing defendants' demurrer before her discovery motions.

We will reverse the judgment as to the wrongful foreclosure cause of action, a portion of the cancellation of instruments cause of action, and a portion of the slander of title cause of action. Based on the well-pleaded allegations in the first amended complaint, which we must accept as true at this stage of the lawsuit, JPMorgan Chase could not assign the deed of trust because it did not have an interest in the note and deed of trust. In all other respects we will affirm the judgment.

BACKGROUND

Gauna's first amended complaint alleged the following:

Pursuant to a note secured by a deed of trust, Gauna promised to pay Long Beach Mortgage Company (LBMC) $168,800 plus interest. LBMC's loan to Gauna was not funded by LBMC, it was funded by investors who bought certificates to the Long Beach Mortgage Loan Trust 2005-1 (LBM Trust).

Gauna signed a deed of trust in relation to real property located in Nevada County (the property). The deed of trust identified Gauna as the borrower and LBMC as the

lender and trustee. It secured to LBMC repayment of the note. Through the deed of trust, Gauna irrevocably granted to LBMC the property, in trust, with power of sale. The deed of trust provided that the note and deed of trust could be sold without prior notice to Gauna. It further provided that the lender may appoint a successor trustee who shall succeed to all title, powers and duties of the original trustee.

Washington Mutual Bank (WaMu) was the original servicer on the loan. It became the successor in interest to LBMC's assets when LBMC closed its operations. However, Gauna's note and deed of trust were sold before LBMC closed and WaMu did not acquire Gauna's note as part of LBMC's assets. The Federal Deposit Insurance Corporation (FDIC) took over WaMu's operations in 2008. JPMorgan Chase bought certain assets of WaMu from the FDIC, but it did not buy any interest in Gauna's note.

A process to modify Gauna's loan was started in August 2008.[1] Gauna did not miss a payment on her loan until March 2009, when a JPMorgan Chase branch representative was unable to process her monthly payment. A JPMorgan Chase branch representative also could not process Gauna's April 2009 payment.

On or about May 1, 2009, Gauna received a Trial Period Plan (TPP) offer which outlined the steps she should take to obtain a loan modification, including making three monthly payments of $1,034. The cover letter for the offer was from WaMu which purportedly was "becoming Chase." The offer identified JPMorgan Chase as the lender. The offer promised to modify Gauna's adjustable interest rate loan if Gauna timely made TPP payments and if she qualified under the federal Home Affordable Modification Program (HAMP). Gauna accepted the TPP offer. She made TPP payments in May, June and July 2009.

---

[1] While her trial counsel argued that she did not seek a loan modification, in her appellate opening brief Gauna concedes that she sought to modify her loan after her monthly payments fluctuated from $950 up to $1,600 per month.

At some point, Chase Home Finance serviced Gauna's loan. A Chase Home Finance representative instructed Gauna to continue making TPP payments until she received a loan modification agreement. Gauna made TPP payments during the period August 2009 through January 2010. In January 2010, Gauna was instructed to stop making further payments until a loan modification agreement was executed. She attempted to make payments in February and March 2010, but those payments were refused.

Gauna received a loan modification agreement on March 18, 2010, with instructions to sign and return the agreement within seven days. The agreement did not account for $10,340 in TPP payments Gauna had made. It increased the principal balance on Gauna's loan from $168,800 to $172,063.08.[2] It contained undefined terms and terms Gauna opposed.

Gauna sought clarification about the role of Chase Home Finance and asked about the identity of the lender. She spoke with several Chase Home Finance representatives about terms in the loan modification agreement and the non-credited TPP payments. Chase Home Finance representatives refused to explain terms. They intimidated Gauna into signing the agreement by threatening to deny modification altogether. Gauna signed the agreement but wrote on it, "I am requesting an appraisal and an extension; I am

---

[2] The cover letter to the loan modification agreement states that any past due amounts as of the end of the trial period, including unpaid interest, real estate taxes, insurance premiums and certain assessments paid on the borrower's behalf to a third party, will be added to the loan balance to the extent permitted by law. Section 3 of the loan modification agreement further states that the modified principal balance will include all amounts and arrearages that will be past due as of the modification effective date -- May 1, 2010 -- including unpaid and deferred interest, fees, escrow advances and other costs, but excluding unpaid late charges, less any amounts paid to the lender but not previously credited to the loan.

signing with great stress and pressure with unanswered questions. Also your window of response is unreasonable."

Chase Home Finance refused to execute the loan modification agreement. It required Gauna to go through the modification process again. And it instructed Gauna to stop making payments to requalify for a loan modification. After making her April, May and June 2010 payments, Gauna did not make a July 2010 payment upon the instruction of a JPMorgan Chase representative. She sent her completed loan modification application to JPMorgan Chase. And she made a modified loan payment in August 2010.

In December 2010, CRC recorded an assignment of the deed of trust in Nevada County. The assignment said JPMorgan Chase assigned to Deutsche Bank, as trustee of the LBM Trust, Gauna's note and deed of trust. The LBM Trust was closed at the time of the assignment.

CRC also recorded a substitution of trustee. The person who signed the substitution purportedly signed it as an officer of JPMorgan Chase, as attorney in fact for Deutsche Bank, in its capacity as trustee of the LBM Trust. The document said Deutsche Bank substituted CRC as the trustee of Gauna's deed of trust.

CRC also executed and recorded a notice of default stating that Gauna was in default by $23,358.34 as of December 22, 2010. CRC then executed a notice of trustee's sale which was recorded in Nevada County.

Gauna filed a petition for bankruptcy under Chapter 13 of the Bankruptcy Code about a month later. The bankruptcy action was dismissed.

Almost 11 months after the termination of the bankruptcy action, CRC recorded another notice of trustee's sale. CRC recorded three more notices of trustee's sale in 2013. It ultimately conducted a trustee's sale in September 2013. And it recorded a trustee's deed upon sale, transferring all of its right, title and interest in the property to Deutsche Bank, as trustee of the LBM Trust.

Five days later, Gauna filed a complaint against JPMorgan Chase, Chase Home Finance, CRC and Deutsche Bank. The trial court sustained defendants' demurrer in part with leave to amend and in part without leave to amend.

Gauna filed a first amended complaint, alleging fraud and deceit, breach of contract, cancellation of instruments, wrongful foreclosure, slander of title, violation of Business and Professions Code section 17200 et seq., and conversion. Defendants also demurred to that pleading. The trial court sustained the demurrer to all causes of action without leave to amend. It denied Gauna's motion for reconsideration and dismissed the action. Because Gauna's appellate opening brief does not address the trial court's order sustaining the demurrer to the conversion cause of action, we will not address the propriety of a demurrer as to that cause of action.

STANDARD OF REVIEW

A demurrer tests the legal sufficiency of the challenged pleading. (*Milligan v. Golden Gate Bridge Highway & Transportation Dist*. (2004) 120 Cal.App.4th 1, 5.) We independently evaluate the pleading, construing it liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context. (*Id.* at pp. 5-6.) We assume the truth of all material facts properly pleaded or implied and consider judicially noticed matter, but we do not assume the truth of contentions, deductions or conclusions of law. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 966-967.) We also disregard those allegations in the pleading which contradict judicially noticed facts. (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1054.) Viewing matters through this prism, we determine de novo whether the factual allegations of the challenged pleading are adequate to state a cause of action under any legal theory. (*Milligan*, at p. 6.) We will affirm the judgment if proper on any grounds stated in the demurrer, whether or not the trial court acted on that ground. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) The appellant bears the burden of demonstrating that the demurrer was sustained erroneously.

(*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1485.)

DISCUSSION

I

Gauna argues the trial court erred in taking judicial notice of hearsay and disputed facts. We review a trial court's ruling on a request for judicial notice for abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, disapproved on another ground in *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 939, fn. 13 (*Yvanova*).)

Gauna asserts the trial court took judicial notice of a "private agreement pulled from a website." Her claim is forfeited because she does not cite the portion of the record supporting it. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Gauna further claims the trial court took judicial notice of disputed facts contained in the notice of default. Again, however, she does not cite the portion of the record in which the trial court took judicial notice of the facts she describes. We are not required to examine such an undeveloped claim. (*Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, 984.) The claim is forfeited. (*Nwosu,* at p. 1246.)

II

Gauna next contends the trial court erred in ruling that her fraud and deceit cause of action is time-barred.

While Gauna addresses the statute of limitations ground for the trial court's ruling, she does not address the other grounds upon which the trial court sustained the demurrer on the fraud cause of action. The trial court correctly determined that the first amended complaint fails to state a cause of action for fraud because the pleading falls short of the specificity needed to state a claim for fraud and fails to allege specific facts showing all the elements of fraud. Accordingly, we need not address whether the fraud cause of action is time-barred.

" 'The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) To withstand demurrer, a plaintiff must plead facts constituting every element of fraud with particularity. (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 35 (*Kalnoki*).) The plaintiff must plead facts which show how, when, where, to whom and by what means a misrepresentation was tendered. (*Lazar, supra,* 12 Cal.4th at p. 645.) And when the defendant is a corporation, the plaintiff must " 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' " (*Ibid.*) General and conclusory allegations will not suffice. (*Ibid.*)

Gauna alleges fraud with regard to the loan origination, the modification of the loan, the notice of default, and the assignment of the deed of trust.

A

As to the loan origination, Gauna alleges wrongful acts by LBMC. The trial court found the allegations lacked the requisite specificity, and we agree. For example, regarding the allegation that LBMC changed the interest rate for Gauna's loan from fixed to adjustable, there is no allegation that a specified individual made a specified misrepresentation on a specified date. But there is also another deficiency. Gauna fails to allege facts showing how Chase Home Finance, Deutsche Bank and CRC can be liable for the alleged fraudulent acts by LBMC, which is not a defendant in this action.

B

Turning to the loan modification, the first amended complaint alleges the lender and Chase Home Finance represented that if Gauna entered into the TPP and complied with its terms, Chase Home Finance and the lender would modify her loan. It alleges Gauna justifiably relied on that representation and made modified payments, but Chase

Home Finance and the lender refused to execute the modification agreement and instead demanded that Gauna resubmit her financial information and make another set of TPP payments. Chase Home Finance and the lender then rejected Gauna's TPP payments, declared a default and foreclosed on the property. Gauna says she lost the property as a result of defendants' fraud.

Gauna fails to allege a false representation because she admits she received an offer to modify her loan. The first amended complaint alleges Chase Home Finance and the lender refused to execute the loan modification agreement, but it also alleges facts showing that Gauna did not unconditionally accept the terms of the loan modification agreement. Rather, Gauna asked for an appraisal and an extension and objected that she signed the agreement with "great stress and pressure with unanswered questions."

" '[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract [citations]." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855-856; see Civ. Code § 1585.) An acceptance which, as here, contains additions or limitations is a rejection of the offer and amounts to a counteroffer. (*Panagotacos*, at pp. 855-856; *Ajax Holding Co. v. Heinsbergen* (1944) 64 Cal.App.2d 665, 669-670.) A counteroffer containing a condition not in the original offer, if not accepted by the original offeror, does not result in a contract. (*Ajax Holding*, at pp. 669-670.) Gauna cites no authority requiring an original offeror to accept a counteroffer.

Guzman v. Visalia Community Bank (1999) 71 Cal.App.4th 1370, a case Gauna's counsel cited during oral argument, is not on point. That decision held that general contract principles did not apply in determining whether a Code of Civil Procedure section 998 offer was rejected. (*Id.* at p. 1377.) But this case does not involve an offer to compromise made pursuant to Code of Civil Procedure section 998.

The first amended complaint also fails to allege facts showing knowledge of falsity, intent to defraud and that Gauna's alleged injury -- making modified payments

and loss of the property -- was caused by Chase Home Finance or the lender's alleged misrepresentation. As for the last fraud element, continuing to make modified loan payments does not constitute detrimental reliance because Gauna was contractually obligated to make loan payments. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 79 (*Lueras*); *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 795 (*West*).) Gauna fails to allege specific facts showing how her reliance on defendants' promise to modify her loan caused her to default on her loan or prevented her from curing that default. (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1499-1500 (*Rossberg*).)

C

Regarding the notice of default, the first amended complaint alleged the notice represented that Gauna was in default by $23,358.34 as of December 22, 2010, but the representation was false because it did not account for $13,442 in TPP payments and it included improper charges. Gauna alleged Chase Home Finance and the lender caused the notice of default to be recorded even though they knew it was false. She claimed the false representation prevented her from clearing the arrears and she lost the property as a result.

A plaintiff asserting fraud must plead actual reliance, i.e., a causal relationship between the alleged misrepresentation and the harm claimed to have resulted therefrom. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864.) The plaintiff must "allege specific facts not only showing he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused the alleged damages. [Citation.]" (*Rossberg, supra*, 219 Cal.App.4th at p. 1499; see *Lueras, supra*, 221 Cal.App.4th at p. 79.) "If the defrauded plaintiff would have suffered the alleged damage even in the absence of the fraudulent inducement, causation cannot be

alleged and a fraud cause of action cannot be sustained.' " (*Rossberg*, at p. 1499, italics omitted; see *Lueras*, at p. 79.)

The first amended complaint does not allege facts showing a causal relationship between Gauna's alleged injury and the allegedly inflated amount stated in the notice of default. In particular, Gauna does not allege facts showing that she took or did not take some action because of the misstatement in the notice of default. (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1008 (*Orcilla*); *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1615 (*Hamilton*); *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1091.) Her general allegation that she relied on the false representations by defendants is conclusory and insufficient to plead fraud. (*Glaski*, at p. 1091.) While she alleged she could have cleared the arrears, the first amended complaint indicated Gauna did not make other payments, and she stated in her appellate opening brief that she last made a payment on the note in August 2010 and she was $13,442 in arrears. She does not say she could have paid the arrears not caused by defendants' alleged refusal to accept her payments. Without a loan modification, Gauna was still obligated to make the payments due under her note. (*Lueras, supra*, 221 Cal.App.4th at p. 79) The TPP Agreement expressly provided that the lender's acceptance of a payment during the TPP period did not constitute a cure of Gauna's default under the loan documents unless such payments were sufficient to completely cure her entire default under the loan documents. It also stated that the terms of the loan documents remained in full force and effect and the TPP did not release the obligations contained in the loan documents.

D

As for the assignment of the deed of trust, the first amended complaint alleged Colleen Irby falsely represented in the assignment that she was an officer of JPMorgan Chase, thereby obscuring the identity of the lender and preventing Gauna from resolving the servicing improprieties, which resulted in the loss of the property. But those

allegations are not specific enough. They do not allege what action Gauna took or did not take in reliance on Irby's alleged misrepresentation (*Orcilla, supra*, 244 Cal.App.4th at pp. 1007-1008; *Hamilton, supra,* 195 Cal.App.4th at p. 1615), and they do not specify exactly how she lost her property because of Irby's alleged false representation. Gauna was in arrears and the first amended complaint does not allege that she was able to bring her loan current.

III

Gauna further argues the first amended complaint states a cause of action for breach of contract.

The elements of a cause of action for breach of contract include (1) the existence of a contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) damages to the plaintiff caused by the breach. (*Orcilla, supra*, 244 Cal.App.4th at p. 1005.) To the extent Gauna alleges the breach of a written contract, she may plead the contract by its terms (set out verbatim or with a copy of the contract attached to her pleading and incorporated therein by reference) or by its legal effect by alleging the substance of its relevant terms. (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 993.)

The first amended complaint alleged that the note, deed of trust and TPP were breached. The trial court took judicial notice of the note and deed of trust; those documents show an agreement between Gauna and LBMC. The note and deed of trust did not mention JPMorgan Chase, Chase Home Finance or Deutsche Bank. Further, based on the allegations of the first amended complaint, neither JPMorgan Chase nor Deutsche Bank is a successor in interest to LBMC. The first amended complaint did not allege facts showing the existence of a note or deed of trust between Gauna, on the one hand, and JPMorgan Chase, Chase Home Finance or Deutsche Bank, on the other, and the terms of any such note or deed of trust. Therefore, the trial court properly sustained the demurrer to the breach of contract cause of action based on the note and deed of trust

because Gauna cannot assert a claim for breach of contract against an entity that is not a party to the contract. (*Universal Bank v. Lawyers Title Ins. Corp.* (1997) 62 Cal.App.4th 1062, 1066 (*Universal Bank*); *Tri-Continent International Corp. v. Paris Savings & Loan Assn.* (1993) 12 Cal.App.4th 1354, 1359 (*Tri-Continent)*.)

Turning to the TPP agreement, the first amended complaint alleged Chase Home Finance and the lender breached that agreement by refusing to execute the loan modification and by failing to provide Gauna with a fair and reasonable modification agreement.

Exhibit 3 to the first amended complaint is a copy of the purported TPP agreement. That exhibit includes a three-page document entitled "Home Affordable Modification Trial Period Plan" (hereafter TPP agreement) and a cover letter from "JPMorgan Chase Bank, N.A., successor to Washington Mutual Bank." Chase Home Finance and Deutsche Bank are not mentioned in the TPP agreement. Moreover, the first amended complaint fails to state facts showing that Chase Home Finance or Deutsche Bank are parties to the TPP agreement. Accordingly, the first amended complaint fails to state breach of contract claims against Chase Home Finance and Deutsche Bank based on the TPP agreement. (*Universal Bank, supra,* 62 Cal.App.4th at p. 1066; *Tri-Continent, supra,* 12 Cal.App.4th at p. 1359.)

The TPP agreement said if Gauna was in compliance with the TPP and her representations in the document continued to be true, JPMorgan Chase would provide her with a Home Affordable Modification Agreement which would amend the note. JPMorgan Chase does not argue that the TPP agreement is not a contract. Under the terms of the TPP agreement, JPMorgan Chase was obligated to provide Gauna with a loan modification agreement if Gauna complied with the terms of the TPP and her representations in the document continued to be true. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 925-928 (*Bushell*); *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 560-561 (*Wigod*).)

However, the first amended complaint alleges that Gauna received a Home Affordable Modification Agreement (loan modification agreement). The facts alleged do not, therefore, demonstrate a breach of contract. Gauna did not unequivocally accept the terms of the loan modification agreement. She does not state a cause of action for breach of contract based merely on the argument that defendants were required to accept her counteroffer.

The first amended complaint also claims defendants breached the TPP agreement by failing to offer a fair and reasonable loan modification agreement. We agree with Gauna that a lender's duty to offer a loan modification pursuant to a TPP includes a duty to offer a good faith permanent loan modification. (*Bushell, supra,* 220 Cal.App.4th at pp. 925-928; *West, supra,* 214 Cal.App.4th at pp. 796-799; *Wigod, supra,* 673 F.3d at p. 565.) But Gauna argues the loan modification agreement was not in good faith because it was a contract of adhesion presented to her on a "take it or leave it" basis, it inexplicably increased her principal balance by $3,200, it included a balloon payment of $38,513.47, and it had vague terms that were prejudicial to her.

The phrase contract of adhesion "signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694.) A contract of adhesion is nevertheless enforceable according to its terms unless it defeats the reasonable expectations of the weaker or adhering party, and even if consistent with the reasonable expectations of the adhering party, it is unduly oppressive or unconscionable. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 108; *Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 201; *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1375.) Unconscionability has both procedural and substantive elements. (*Lona, supra,* 202 Cal.App.4th at p. 109.) Substantive unconscionability may exist when a contract has overly-harsh or one-sided results or when it reallocates the risks of the bargain in an

objectively unreasonable or unexpected manner. (*A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 487.)

The first amended complaint did not allege facts showing how the loan modification agreement defeated Gauna's objectively reasonable expectations. (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 721-724.) Gauna had to allege specific facts because an allegation that a contract is unconscionable is mere legal conclusion. (*Shadoan v. World Sav. & Loan Assn*. (1990) 219 Cal.App.3d 97, 103.)

The loan modification agreement stated that the modified principal balance on the note would include all past due amounts, including unpaid and deferred interest, fees, escrow advances and other costs (but not unpaid late charges), less any amounts paid to the lender but not previously credited to Gauna's loan. The cover letter to the TPP similarly advised Gauna that past due amounts, including unpaid interest, taxes, insurance and assessments paid on Gauna's behalf to a third party, would be added to the principal loan balance. According to the first amended complaint, no monthly loan payments were made on Gauna's loan for two months in 2009 and for at least four months in 2010. On this record, an approximately $3,200 increase in the principal loan balance was not without explanation and was not substantively unconscionable.

In addition, Gauna offers no facts showing that the terms of the proposed modified loan or other circumstances were overly-harsh or one-sided and unjustified. She does not present legal analysis with citation to supporting authority establishing that the loan modification agreement is unenforceable, and we are not obligated to perform that function for her. (*Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1045, fn. 1 (*Okasaki*); *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656 (*Keyes*).)

Furthermore, the first amended complaint failed to allege damages caused by defendants' breach of the TPP agreement. It alleged Gauna was forced to continue to pay under the unconscionable terms of the note, lost her property and incurred legal fees and costs because of defendants' breaches, but it did not allege that Gauna was not in default

under her loan and that absent the alleged breaches by defendants, Gauna would have avoided foreclosure and the loss of the property. (*Orcilla, supra*, 244 Cal.App.4th at p. 1005.)

The first amended complaint fails to state a cause of action for breach of contract against JPMorgan Chase, Chase Home Finance and Deutsche Bank. Accordingly, we need not address whether any such cause of action is time-barred.

IV

Gauna claims the trial court erred in ruling that she lacked standing to challenge the assignment of the deed of trust, and that tender was required to state a cause of action for wrongful foreclosure.

After the trial court ruled that Gauna lacked standing to challenge the assignment of the deed of trust, the California Supreme Court held in *Yvanova, supra,* 62 Cal.4th 919, that a borrower of a home loan secured by a deed of trust who has been subjected to a nonjudicial foreclosure has standing to sue for wrongful foreclosure based on an allegedly void assignment of the note and deed of trust -- e.g., that the foreclosing entity lacked authority to pursue foreclosure -- even if the borrower is in default on the loan and is not a party to the challenged assignment. (*Id.* at pp. 924, 935, 939.) Under *Yvanova*, Gauna has standing to challenge the assignment of the deed of trust if the assignment is void but not where the assignment is voidable. (*Id.* at pp. 942-943.) We independently evaluate the first amended complaint to determine whether it alleges a void assignment.

A suit for wrongful foreclosure is an equitable action to set aside a foreclosure sale, or an action for damages resulting from the sale, based on the assertion that the foreclosure was improper. (*Sciarratta v. U.S. Bank National Assn.* (2016) 247 Cal.App.4th 552, 561.) To succeed on a wrongful foreclosure cause of action, the plaintiff must show that (1) the trustee or mortgagee caused an illegal, fraudulent or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale was prejudiced or harmed; and (3) in cases

where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering. (*Id.* at pp. 561-562.)

In a nonjudicial foreclosure, only the holder of the beneficial interest under the mortgage or deed of trust or its agent may direct the trustee to sell the property. (Civ. Code, § 2924, subd. (a)(1), (6); *Yvanova, supra,* 62 Cal.4th at pp. 929, 935.) If a foreclosing entity claims the power to foreclose based on a void assignment, the foreclosing entity has acted without legal authority and such an unauthorized sale constitutes a wrongful foreclosure. (*Yvanova, supra,* 62 Cal.4th at pp. 929, 935.)

Here, the first amended complaint alleged (1) the lender could not exercise the power of sale because Chase Home Finance and the lender breached the note and deed of trust, (2) the nonjudicial foreclosure was wrongful because the notice of default was deficient in that it inflated the arrears amount and falsely claimed that the notice was issued by CRC as trustee (when LBMC was the trustee) and that JPMorgan Chase was the beneficiary, (3) CRC was not a validly substituted trustee, and (4) Deutsche Bank was not the beneficiary under the deed of trust and thus could not enter a credit bid.

Regarding the first allegation, we have already concluded Gauna fails to state a cause of action for breach of the note and deed of trust against JPMorgan Chase, Chase Home Finance and Deutsche Bank. As for the allegedly deficient notice of default, the notice contained the statements required under Civil Code section 2924, subdivision (a)(1) and the first amended complaint does not allege facts showing that the information in the notice caused Gauna injury. However, the first amended complaint states a cause of action for wrongful foreclosure by alleging facts showing that CRC (which Deutsche Bank substituted as the new trustee) had no authority to conduct the nonjudicial foreclosure because JPMorgan Chase, the entity from which Deutsche Bank purportedly obtained an assignment of the deed of trust, did not own a beneficial interest in the loan and deed of trust and, therefore, had no authority to assign the deed of trust to Deutsche Bank.

Defendants say the claim that the assignment is void is based on the late transfer of the note into the LBM Trust. But the first amended complaint alleged other facts which Gauna asserts rendered the assignment void. The first amended complaint alleged that the note and deed of trust were sold before WaMu became LBMC's successor in interest. Therefore, according to the first amended complaint, JPMorgan Chase did not acquire any interest in the note and deed of trust when it purchased WaMu's assets from the FDIC. Contrary to the assertion by counsel for JPMorgan Chase at oral argument, Gauna raised this issue in her appellate opening brief. She urges on appeal that her loan was sold before LBMC merged with WaMu and, therefore, JPMorgan Chase did not acquire her loan from the FDIC. She complains that the trial court failed to address that allegation.

The case of *Sciarratta, supra,* 247 Cal.App.4th 552, is instructive. In that case, the plaintiff executed a promissory note secured by a deed of trust identifying WaMu as the lender. (*Sciarratta, supra,* 247 Cal.App.4th at pp. 556-557.) About four years later, JPMorgan Chase, as successor in interest to WaMu, assigned the note and deed of trust to Deutsche Bank, as trustee for Long Beach Mortgage Loan Trust 2006-6. (*Id.* at p. 557.) The plaintiff defaulted on her loan and the trustee recorded a notice of default and trustee's sale. (*Ibid.*) JPMorgan Chase then assigned the note and deed of trust to Bank of America, which foreclosed on the deed of trust. (*Id.* at pp. 557-558.) The plaintiff brought a wrongful foreclosure action, alleging that the assignment to Bank of America was void and Bank of America had no right to foreclose because JPMorgan Chase had previously assigned the note and deed of trust to Deutsche Bank. (*Id.* at pp. 561-562.) The documents subject to judicial notice were consistent with the plaintiff's allegations. (*Id.* at p. 563.) The court in *Sciarratta* held that the assignment to the foreclosing entity (Bank of America) was void and not merely voidable because having assigned all beneficial interest in the plaintiff's note and deed of trust to Deutsche Bank, JPMorgan Chase could not later assign the same interests to Bank of America. (*Id.* at p. 564.)

In this case, under the facts alleged in the first amended complaint, JPMorgan Chase could not assign the beneficial interest in the note and deed of trust to Deutsche Bank because it did not have any interest in the note and deed of trust to assign. (*Sciarratta, supra,* 247 Cal.App.4th at p. 564; *Barrionuevo v. Chase Bank, N.A.* (N.D. Cal. 2012) 885 F.Supp.2d 964, 971-974 (*Barrionuevo*) [the plaintiffs stated a cause of action for wrongful foreclosure where they alleged that the lender sold the beneficial interest in their deed of trust before the entity purporting to be the beneficiary under the deed of trust acquired the lender's assets]; *Burke v. JPMorgan Chase Bank, N.A* (N.D. Cal. May 11, 2015, No. 13-4249SC) 2015 U.S. Dist. Lexis 61512, p. *8; *Subramani v. Wells Fargo Bank N.A.* (N.D. Cal. Oct. 31, 2013, No. 13-1605SC) 2013 U.S. Dist. Lexis 156556, pp. *10-11; *Javaheri v. JPMorgan Chase Bank, N.A.* (C.D. Cal. June 2, 2011, No. CV10-08185 ODW FFMx) 2011 U.S. Dist. Lexis 62152, pp. *13-14.)

The judicially noticeable facts do not contradict the allegations in the first amended complaint. While the assignment of the deed of trust recites that JPMorgan Chase was the successor in interest to WaMu and WaMu was the successor in interest to LBMC, we may not take judicial notice of those asserted facts because they are subject to dispute. (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375; *Glaski, supra,* 218 Cal.App.4th at p. 1102.) The matters which we must accept as true for purposes of a demurrer show that the assignment from JPMorgan Chase to Deutsche Bank was void; thus, Deutsche Bank had no authority to substitute CRC as the trustee and CRC had no authority to conduct the nonjudicial foreclosure.

The first amended complaint adequately alleges that Gauna suffered harm as a result of the wrongful foreclosure in that it alleges that she lost the property as a result of the void assignment and sale of the property by one without power of sale. (*Sciarratta, supra,* 247 Cal.App.4th at pp. 565-567.) A void contract is a nullity and cannot be validated by any party. (*Yvanova, supra,* 62 Cal.4th at p. 929.) It is hard to imagine that a borrower who has lost his or her property in a sale by an entity that had no right to

enforce the debt has not been prejudiced thereby. (*Sciarratta, supra,* 247 Cal.App.4th at pp. 565-567; see *Yvanova, supra,* 62 Cal.4th at pp. 937-939.)

Kalnoki, supra, 8 Cal.App.5th 23 is inapposite. In contrast with the facts pleaded here, the judicially noticeable facts in *Kalnoki* showed that the entities which executed the substitution of trustee and assignment of the deed of trust and initiated the nonjudicial foreclosure were authorized to do so. (*Id.* at pp. 36-44.)

As respondents concede, tender is not required when the instrument or transaction sought to be cancelled or set aside is void. (*Smith v. Williams* (1961) 55 Cal.2d 617, 621; *Sciarratta, supra,* 247 Cal.App.4th at p. 565, fn. 10; *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 818-819 (*Saterbak*); *Chavez v. Indymac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1063 [the plaintiff need not allege tender where the foreclosure sale was void because the defendants lacked a contractual basis to exercise the power of sale]; *Glaski, supra*, 218 Cal.App.4th at p. 1100; *Cheung v. Wells Fargo Bank, N.A.* (N.D. Cal. 2013) 987 F.Supp.2d 972, 978; *Barrionuevo, supra*, 885 F.Supp.2d at pp. 969-971.)

Based on the above, the trial court erred in sustaining the demurrer to the wrongful foreclosure cause of action.

V

Gauna also contends the trial court erred in sustaining the demurrer to her causes of action for cancellation of instruments, slander of title and violation of Business and Professions Code section 17200 et seq. We will address each cause of action in turn.

A

We begin with the cause of action for cancellation of instruments. Civil Code section 3412 provides: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." To obtain cancellation, a plaintiff must allege facts showing

that the instrument is void or voidable and would cause serious injury if not canceled. (*Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513, 523; *Saterbak, supra,* 245 Cal.App.4th at pp. 818-819; *Kroeker v. Hurlbert* (1940) 38 Cal.App.2d 261, 266.) Here, the cause of action for cancellation of instruments seeks to cancel the note and deed of trust, the assignment of the deed of trust, the notice of default, the substitution of trustee, the notice of trustee's sale, and the trustee's deed upon sale.

The first amended complaint alleges LBMC was not the actual lender on Gauna's loan and provided no consideration for the note because the loan was table-funded by Doe investors. " 'Table-funding' is defined as a 'settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds.' [Citation.] In a table-funded loan, the originator closes the loan in its own name, but is acting as an intermediary for the true lender, which assumes the financial risk of the transaction." (*Easter v. Am. West Fin.* (9th Cir. 2004) 381 F.3d 948, 955, fn. omitted.) The first amended complaint alleges the note and deed of trust are void because they did not identify the real lender and there was no consideration from LBMC. Gauna argues that because of the table-funding and securitization of her loan, the parties who provided the consideration were concealed in violation of Civil Code sections 1550 and 1558, and there was no mutual consent as required under Civil Code section 1580.

Civil Code section 1558 says the ability to identify the parties to a contract is essential to a contract's validity. In this case, the promissory note identifies the lender and the borrower. While Gauna alleges Doe investors actually provided the funds that LBMC lent Gauna, she cites no authority that such an arrangement invalidates the contractual relationship between Gauna and LBMC under the note. (*Logvinov v. Wells Fargo Bank* (N.D. Cal. Dec. 9, 2011, No. C-11-04772 DMR) 2011 U.S. Dist. Lexis 141988, pp. *8-9 [securitization does not change the relationship of the parties to the note]; *Sepehry-Fard v. Nationstar Mortg. LLC* (N.D. Cal. Jan. 26, 2015, No. 14-CV-03218-LHK) 2015 U.S. Dist. Lexis 8790, p. *62 [securitization does not render the

plaintiff's mortgage loans unenforceable].) In any event, the first amended complaint alleges that the true parties to the note are Gauna and the investors who owned the LBM Trust. On this record it appears it was possible to identify the alleged true lender.

Civil Code section 1550 sets forth the essential elements of a contract including consideration and consent. Civil Code section 1580 provides that consent is not mutual unless the parties all agree upon the same thing in the same sense. A reasonable inference from the facts alleged in the first amended complaint is that Gauna received $168,800 in consideration for her execution of the note and deed of trust. Courts have rejected claims that table-funding voids or invalidates a loan. (*Arzamendi v. Wells Fargo Bank, N.A.* (E.D. Cal. Mar. 8, 2018, No. 1:17-cv-01485-CJO-SKO) 2018 U.S. Dist. Lexis 38382, p. *11; *Marquez v. Select Portfolio Servicing, Inc.* (N.D. Cal. Mar. 16, 2017, No. 16-cv-03012-EMC) 2017 U.S. Dist. Lexis 38239, p. *7; *Grieves v. MTC Financial Inc*. (N.D. Cal. July 25, 2017, No. 17-CV-01981-LHK) 2017 U.S. Dist. Lexis 116458, p. *37, fn. 1; see *Silas v. Argent Mortgage Co., LLC* (E.D. Cal. July 24, 2017, No. 1:17-cv-00703-LJO-JLT) 2017 U.S. Dist. Lexis 115324, p. *27; *Sotanski v. HSBC Bank USA, National Assn.* (N.D. Cal. Aug. 12, 2015, No. 15-cv-01489-LHK) 2015 U.S. Dist. Lexis 106859, pp. *17-18; *Ghalehtak v. FNBN I, LLC* (N.D. Cal. May 6, 2016, No. 15-cv-05821-LB) 2016 U.S. Dist. Lexis 61347, p. *9; *Major v. Imortgage.com, Inc.* (C.D. Cal. Feb. 8, 2016, No. 5:15-cv-02592-CASDTBx) 2016 U.S. Dist. Lexis 15225, pp. *9-10.)

Courts have also rejected the argument that a lender loses its interest in a note when it is securitized. (*Sepehry-Fard v. Nationstar Mortg. LLC, supra*, 2015 U.S. Dist. Lexis 8790, p. *62; *Ramirez v. J.P. Morgan Chase Bank, N.A.* (E.D. Cal. June 7, 2013, No. 1:13-CV-352 AWI GSA) 2013 U.S. Dist. Lexis 80624, p. *10 [securitization of the note does not affect the ability to foreclose]; *Hague v. Wells Fargo Bank, N.A.* (N.D. Cal. Dec. 6, 2011, No. C11-02866 TEH) 2011 U.S. Dist. Lexis 140122, p. *16; *Logvinov v. Wells Fargo Bank, supra*, 2011 U.S. Dist. Lexis 141988, pp. *8-9; *Wadhwa v. Aurora Loan Services, LLC* (E.D. Cal. July 8, 2011, No. S-11-1784 KJM KJN) 2011 U.S.

Dist. Lexis 73949, pp. *9-10; *Lane v. Vitek Real Estate Indus. Group* (E.D. Cal 2010) 713 F.Supp.2d 1092, 1099; *Hafiz v. Greenpoint Mortgage Funding, Inc.* (N.D. Cal. 2009) 652 F.Supp.2d 1039, 1043.) Gauna cites no authority voiding a note or deed of trust based on table-funding or securitization.

Gauna claims on appeal that her loan was paid off. But courts have rejected claims that a borrower is relieved of his or her mortgage obligation when the lender received payment in full upon the securitization of a note. (*Javaheri v. JPMorgan Chase Bank, N.A., supra*, 2011 U.S. Dist. Lexis 62152, pp. *13-14; *Hague v. Wells Fargo Bank, N.A., supra*, 2011 U.S. Dist. Lexis 140122, p. *16; *West v. Bank of America, N.A.* (D. Nev. June 22, 2011, No. 2:10-CV-1966 JCM GWF) 2011 U.S. Dist. Lexis 66726, p. *5.)

Gauna also argues that the securitization of her loan introduced new parties, terms and risks to her loan contract. However, the first amended complaint does not allege, and Gauna's appellate brief does not state, facts showing such alteration. Gauna's conclusory statements are insufficient to plead a void or voidable contract. (*New v. Mutual Benefit Health & Accident Assn*. (1938) 24 Cal.App.2d 681, 683 [allegation that policy is "in contravention of the laws of the State of California" and is void are mere conclusions of law]; see 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 674, p. 98 [to state an action to remove cloud over title, facts showing actual invalidity of apparently valid instrument must be specifically pleaded].) The first amended complaint failed to allege facts showing that the note and deed of trust are void or voidable.

The cause of action for cancellation of instruments also seeks to cancel the assignment of the deed of trust, the notice of default, the substitution of trustee, the notice of trustee's sale, and the trustee's deed upon sale.

The first amended complaint alleges the assignment of the deed of trust is void because (1) JPMorgan Chase had no valid interest in the note or deed of trust, (2) the interest in Gauna's note and deed of trust was assigned to Deutsche Bank after the closing date of the LBM Trust, and (3) Colleen Irby was not an officer of JPMorgan

Chase and had no authority to execute the assignment for JPMorgan Chase. The first amended complaint alleges that the notice of default, notice of trustee's sale and trustee's deed upon sale must be cancelled in part because CRC was not the duly authorized trustee and Deutsche was not the beneficiary under the deed of trust. Those allegations appear to be based on the alleged void assignment by JPMorgan Chase.

As we have explained, the assignment of the deed of trust is void under the facts alleged because JPMorgan Chase had no interest in the note or deed of trust to assign. The first amended complaint alleges sufficient facts showing that Gauna would suffer a serious injury if the void assignment is not canceled. (Cf. *Saterbak, supra,* 245 Cal.App.4th at pp. 819-820 [no " 'serious injury' " where assignment was voidable because defective assignment did not change the borrower's payment obligations under the note].) Tender is not required to state a cause of action for cancellation of instruments because Gauna adequately alleged that the assignment is void and not merely voidable. (*Sciarratta, supra,* 247 Cal.App.4th p. 568.)[3]

---

[3] Gauna asserts other grounds for cancellation of the assignment, but those grounds would render the assignment voidable, not void, and Gauna lacks standing to challenge the assignment on those grounds. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 804-805; *Yhudai v. IMPAC Funding Corp.* (2016) 1 Cal.App.5th 1252, 1259; *Saterbak, supra,* 245 Cal.App.4th at p. 815; *Rajamin v. Deutsche Bank National Trust Co.* (2d Cir.2014) 757 F.3d 79, 88-89; *Pratap v. Wells Fargo Bank, N.A.* (N.D. Cal. 2014) 63 F.Supp.3d 1101, 1109; *Maynard v. Wells Fargo Bank, N.A.* (S.D. Cal. Sept. 11, 2013, No. 12cv1435AJB JMA) 2013 U.S. Dist. Lexis 130800, pp. *23-26 [borrower had no standing to challenge assignment allegedly signed by individual who falsely stated she was vice president of loan documentation for the original lender; claim would at most render assignment voidable at the injured party's option].) "California law does not give a party personal standing to assert rights or interests belonging solely to others. [Citations.] When an assignment is merely voidable, the power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to herself." (*Yvanova, supra,* 62 Cal.4th at p. 936,

In addition, because the assignment to Deutsche Bank is void under the facts alleged, Deutsche Bank had no authority to substitute CRC as the trustee under the deed of trust, the notice of default, the substitution of trustee, the notice of trustee's sale, and the trustee's deed upon sale, and those documents are also void under the facts alleged.

The judgment as to the cancellation of instruments cause of action must be reversed with regard to the assignment of the deed of trust, the notice of default, the substitution of trustee, the notice of trustee's sale, and the trustee's deed upon sale.

B

With regard to her cause of action for slander of title, Gauna contends the trial court erred in concluding that (a) the deed of trust, substitution of trustee, and trustee's deed upon sale were privileged under Civil Code section 2924, subdivision (d)(1), (b) the privilege applied because CRC was the trustee under the deed of trust, (c) Gauna must allege malice, and (d) loss of title and investment in the property was not a direct pecuniary loss.

"Slander or disparagement of title occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes the owner thereof ' "some special pecuniary loss or damage." ' [Citation.] The elements of the tort are (1) a publication, (2) without privilege or justification, (3) falsity, and (4) direct pecuniary loss. [Citations.] If the publication is reasonably understood to cast doubt upon the existence or extent of another's interest in land, it is disparaging to the latter's title. [Citation.] The main thrust of the cause of action is protection from injury to the salability of property [citations], which is ordinarily indicated by the loss of a particular sale, impaired marketability or depreciation in value [citations]." (*Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1030.)

---

fn. omitted.) The first amended complaint fails to allege tender, which is essential to an action to cancel a voidable sale under a deed of trust. (*Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117.)

The pecuniary loss element is also satisfied by attorney's fees and costs necessary to clear title. (*Id.* at pp. 1030-1031.)

The slander of title cause of action in the first amended complaint is based on the recording of the assignment of the deed of trust, the notice of default, the substitution of trustee, the notice of trustee's sale, and the trustee's deed upon sale. Gauna fails to show how the recording of the assignment of the deed of trust and the substitution of trustee disparaged her title to the property. The first amended complaint does not state a slander of title cause of action based on the recording of those documents.

However, the recording of the notice of default, the notice of trustee's sale, and the trustee's deed upon sale constitute publications for purposes of a slander of title cause of action. (*Ghuman v. Wells Fargo Bank, N.A.* (E.D. Cal. 2013) 989 F.Supp.2d 994, 1000 (*Ghuman*).) The first amended complaint alleged those documents contained false statements of material fact and their recording impaired Gauna's title to the property. The alleged falsity was that CRC was authorized to conduct a nonjudicial foreclosure under the deed of trust.

Nevertheless, the recording of a notice of default, a notice of sale, and a trustee's deed upon sale is protected by a qualified privilege. (Civ. Code, § 2924, subd. (d)(1), (2); *Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1336; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 333.) The privilege protects communications made without malice. (*Kachlon*, at p. 336.) Malice means the defendant was " ' "motivated by hatred or ill will towards the plaintiff" ' " or " ' "lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." ' " (*Ibid.*) Implied malice is sufficient to defeat the qualified privilege. (*Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 66.)

The first amended complaint alleged JPMorgan Chase, Chase Home Finance, CRC and Deutsche Bank knew the recorded documents contained false representations and intended the recorded documents "to have a specific legal effect based on those false

representations." We understand the allegation to mean that JPMorgan Chase, Chase Home Finance, CRC and Deutsche Bank intended to use the recorded documents to foreclose on the property even though they knew they did not have a right to foreclose because JPMorgan Chase never acquired an interest in the note and deed of trust. The first amended complaint alleges sufficient facts to plead malice. (*Ghuman, supra*, 989 F.Supp.2d at p. 1000 [allegation that the defendants' recording of documents was " 'knowingly wrongful' " was sufficient to defeat the privilege]; *Barrionuevo, supra*, 885 F.Supp.2d at p. 975 [allegations that the defendants published a notice of trustee's sale with " 'malice and a reckless disregard for the truth' " and the publications were false were sufficient to withstand challenge to the pleading]; *Davis v. Wood* (1943) 61 Cal.App.2d 788, 794-795 [allegation that the defendants recorded documents maliciously and with knowledge that their claims were wholly false was sufficient to negative any privilege].)

Gauna alleged the recording of the challenged documents diminished the marketability of her title to the property and caused her to lose her investment in the property through an improper foreclosure. That is sufficient to allege the " 'direct pecuniary loss' " element of a slander of title cause of action. (*Barrionuevo, supra*, 885 F.Supp.2d at p. 975.)

Based on the above, the trial court erred in sustaining the demurrer to the slander of title cause of action as to the recording of the notice of default, the notice of trustee's sale, and the trustee's deed upon sale. But Gauna fails to demonstrate error as to the recording of the assignment of the deed of trust and the substitution of trustee.

C

Turning to the cause of action for violation of Business and Professions Code section 17200 et seq., the trial court concluded Gauna failed to show standing because her factual allegations did not demonstrate an economic injury caused by the defendants' conduct. We agree.

Gauna's Business and Professions Code cause of action is based on the following alleged acts: Chase Home Finance and the lender refused to accept Gauna's loan payments, refused to execute the loan modification agreement, and caused to be recorded a notice of default that did not account for all monies paid and inflated the arrears; CRC falsely claimed to be the trustee; and Deutsche Bank accepted late assignments into the LBM Trust.

Business and Professions Code section 17200 et seq. prohibits and provides civil remedies for any unlawful, unfair or fraudulent business act or practice. Actions for relief by a private plaintiff are limited to those who have been injured in fact and lost money or property as a result of an unlawful, unfair or fraudulent business act or practice. (Bus. & Prof. Code, § 17204.) The plaintiff must plead general facts showing an economic injury which was caused by the defendant's unlawful, unfair or fraudulent business act or practice. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 322, 327.)

When a Business and Professions Code section 17200 et seq. claim is derivative of other substantive causes of action, the claim "stand[s] or fall[s] depending on the fate of the antecedent substantive causes of action." (*Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 178.) Regarding the alleged refusal to accept Gauna's loan payments, the first amended complaint fails to state a breach of contract cause of action against JPMorgan Chase, Chase Home Finance and Deutsche Bank and Gauna fails to demonstrate how the refusal to accept loan payments constitutes an unlawful, unfair or fraudulent business act or practice by any defendant. As for the allegation that Chase Home Finance and the lender refused to execute the loan modification agreement, as we have explained, Gauna rejected the offer of a modification and she cites no authority mandating acceptance of her counteroffer. Because her claims are not supported by legal analysis and citation to authority, they are forfeited. (*Okasaki, supra,* 203 Cal.App.4th at p. 1045, fn. 1; *Keyes, supra,* 189 Cal.App.4th at p. 656.) The first amended complaint

does not state facts showing an unlawful, unfair or fraudulent business act or practice based on those allegations.

With regard to the other bases for the Business and Professions Code section 17200 et seq. cause of action, the first amended complaint does not allege facts showing a causal connection between the alleged wrongful act and the alleged injury. A plaintiff fails to plead a causal connection between the alleged injury and the unlawful, unfair or fraudulent business act or practice if he or she would have suffered the same harm regardless of the defendant's act or practice. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 522 (*Jenkins*), disapproved on another ground in *Yvanova, supra,* 62 Cal.4th at p. 939, fn. 13; *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1099 (*Daro*).)

Gauna represented that she was unable to pay her regular monthly loan payments. She began making modified loan payments in May 2009. The first amended complaint alleges the notice of default overstated the amount of arrears by over $13,422, but it does not allege Gauna would not otherwise have defaulted on the note. The order sustaining the demurrer was proper because the first amended complaint failed to allege that Gauna would not have been injured absent defendants' wrongful acts. (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 614; *Jenkins, supra*, 216 Cal.App.4th at p. 523; *Daro, supra,* 151 Cal.App.4th at p. 1099; *Diunugala v. JP Morgan Chase Bank, N.A.* (S.D. Cal. 2015) 81 F.Supp.3d 969, 992.)

Gauna identifies additional alleged acts or omissions in her appellant's opening brief that she claims constituted violations of Business and Professions Code section 17200 et seq., but her assertion is forfeited because she fails to provide legal argument and citation to authority in support. (*Okasaki, supra,* 203 Cal.App.4th at p. 1045, fn. 1; *Keyes, supra,* 189 Cal.App.4th at p. 656.) " 'The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.' " (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

VI

Gauna claims the trial court erred in denying her leave to amend. We consider whether the challenged pleading might state a cause of action if the appellant were permitted to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If the complaint could be amended to state a cause of action, the trial court abused its discretion in denying leave to amend and we will reverse; if not, there has been no abuse of discretion and we will affirm. (*Ibid*.) The appellant bears the burden of showing a reasonable possibility that a defect can be cured by amendment. (*Ibid*.)

The allegations in the first amended complaint are substantially the same as those in the original complaint. Gauna fails to demonstrate that she can amend her first amended complaint to state a cause of action for fraud and deceit, breach of contract and violation of Business and Professions Code section 17200 et seq.

Gauna's appellant's opening brief "seeks the right to add claims for Promissory Estoppel, Intentional Misrepresentations, Negligence, and Tortious Interference." We need not consider her request because it is not supported by legal analysis and citation to authority. (*Okasaki*, *supra*, 203 Cal.App.4th at p. 1045, fn. 1; *Keyes*, *supra*, 189 Cal.App.4th at p. 656.)

VII

Gauna further contends the trial court erred in hearing defendants' demurrer before her discovery motions. She filed motions to compel further discovery responses and for monetary sanctions against defendants after the trial court sustained the demurrer to the original complaint. The discovery motions were set to be heard after the deadline for Gauna to file a first amended complaint. But the parties stipulated to continue the hearing on the discovery motions as they attempted to resolve the issues raised in the motions. Thereafter, the trial court dismissed the action when Gauna failed to file an amended complaint, and it took all hearing dates off its calendar. The trial court subsequently vacated the judgment of dismissal.

In the meantime, defendants notified the trial court they would demur to the first amended complaint and asked that Gauna's discovery motions not be re-calendared until after the trial court heard the demurrer. Gauna asked that her discovery motions be re-calendared. The trial court directed the court clerk to file Gauna's first amended complaint and set a hearing on her discovery motions for September 26, 2014. But defendants filed their demurrer to the first amended complaint and the hearing on the demurrer was set before the hearing on the discovery motions. After sustaining the demurrer to the first amended complaint without leave to amend, the trial court dropped the hearing on the discovery motions as moot.

We review the trial court's scheduling decisions for abuse of discretion. (*In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, 1130; see *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, 1004.) Here, the record does not show that the trial court abused its discretion in setting the order in which it would hear the parties' motions. There is no reporter's transcript or other document indicating the trial court's reasons for scheduling the hearing dates. Gauna fails to demonstrate error. (*Rhule v. WaveFront Technology, Inc.* (2017) 8 Cal.App.5th 1223, 1228-1229; *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039.)

DISPOSITION

The judgment is reversed regarding the wrongful foreclosure cause of action. It is also reversed regarding the cancellation of instruments cause of action as it pertains to the assignment of the deed of trust, the notice of default, the substitution of trustee, the notice of trustee's sale, and the trustee's deed upon sale. In addition, the judgment is reversed regarding the slander of title cause of action as it pertains to the recording of the notice of default, the notice of trustee's sale, and the trustee's deed upon sale. The judgment is

otherwise affirmed. Gauna shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

/S/
MAURO, J.

We concur:

/S/
BLEASE, Acting P. J.

/S/
DUARTE, J.